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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 877

EARL SERAP, RALPH ROSS and BARTON FRISBEE,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Come now Earl Serap, Ralph Ross and Barton Frisbee, petitioners herein, and pray that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of the State of Michigan entered in the above cause January 15, 1964.

OPINION

The opinion of the Supreme Court of Michigan in this case is unreported. That opinion is contained in the appendix of this petition as provided by Rule 23(a)(i) of the Rules of this Court.

JURISDICTION

The judgment of the Supreme Court of the State of Michigan sought to be reviewed in this Court was entered January 15, 1964. By order of this Court entered January 27, 1964, execution of petitioners' sentences was stayed pending the filing and disposition by this Court of their petition for a writ of certiorari and, on that date, petitioners were enlarged upon bail. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Petitioners were informed against in Recorder's Court for the City of Detroit, Michigan in a 2-count information or indictment charging them with conspiracy. A trial by jury resulted in the conviction of petitioner Scrap on both counts and petitioners Ross and Frisbee on one count.

Before selection of the jury began, the prosecuting attorney moved to empanel a 14-man jury as authorized by Michigan statute. Defendants strenuously objected to such procedure on the ground that they would thereby be denied the equal protection of the law guaranteed by the 14th Amendment to the United States Constitution because the 14-man jury statute failed to provide them with any more peremptory challenges than is given to a person placed on trial before a 12-man jury. The question thus presented is:

> "Whether a state statute which provides for empanelling a jury of more than 12 persons in a criminal case, but which fails to provide a defendant with any more peremptory challenges than are given to a defendant placed on trial before an ordinary

12-man jury, denies to a defendant so placed on trial the equal protection of the law guaranteed by the 14th Amendment of the United States Constitution."

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitution provision involved is Sec. 1 of Article XIV of the Constitution of the United States. The Michigan statutes involved are Secs. 768.18 and 768.12, Comp. Laws 1948, (Secs. 28.1041 and 28.1035 Mich. Stats. Anno.). Sec. 768.18, Comp. Laws 1948, (28.1041 Mich. Stats. Anno.) provides:

> "Any judge of a court of record in this state about to try a criminal case which is likely to be protracted, may order a jury empaneled of not to exceed fourteen [14] members, who shall have the same qualifications and shall be empaneled in the same manner as is, or may be, provided by law for empaneling juries in such courts. All of said jurors shall sit and hear said cause. Should any condition arise during the trial of said cause which in the opinion of the trial court justifies the excusal of any of the jurors so empaneled from further service, he may do so and said trial shall proceed, unless the number of said jurors be reduced to less than twelve [12], and in the event that there shall be more than twelve [12] jurors left on said jury after the charge of the court, the clerk of the court in the presence of said court shall place the names of all of the said jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose, and shall draw therefrom the names of a sufficient number to reduce the jury to twelve [12] members who shall then proceed to determine the issue presented in the manner provided by law."

Sec. 768.12, Comp. Laws 1948, (28.1035 Mich. Stats. Anno.) provides:

> "Any person who is put on trial for an offense which is not punishable by death or life imprisonment shall be allowed to challenge peremptorily five [5] of the persons drawn to serve as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily in such cases five [5] of such jurors and no more. In cases involving two [2] or more defendants who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily five [5] persons returned as jurors and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times five [5] of the persons returned as jurors as there may be defendants being so jointly tried."

STATEMENT OF THE CASE

Defendants were tried and convicted by a jury in Recorder's Court for the City of Detroit, Michigan of the crime of conspiracy. Petitioner Serap was sentenced to a prison term of 2½ to 5 years and petitioners Ross and Frisbee to a prison term of 2 to 5 years.

Prior to the commencement of the trial and the selection of a jury, the prosecuting attorney moved to empanel a 14-man jury pursuant to a Michigan statute. Objection was immediately made by all defendants [p. 11 Appendix, *infra*, (R. 6)] that the foregoing statute was unconstitutional because it denied them the equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States in that only 5 peremptory challenges would be allowed them in such case—the same number as allowed

to a defendant placed on trial before an ordinary 12-man jury. The trial court summarily overruled defendants' objections and empanelled a jury of 14 persons, [p. 11 Appendix, *infra*, (R. 6)]. Petitioner Serap exercised all 5 of his peremptory challenges [p. 11 Appendix, *infra*, (R. 6)]. Following their conviction, and within the time allowed by the law of Michigan, petitioners filed their application for leave to appeal with the Michigan Supreme Court in which application they again urged that the 14-man jury statute was unconstitutional as denying them equal protection of the law (R. iii). The application for leave to appeal was denied by the Michigan Supreme Court as follows: [p. 12 Appendix, *infra*, (R. 113, 78)]:

> "In this cause an application is filed by defendant for leave to appeal from the judgment and sentence of Recorder's Court for the City of Detroit, and an answer thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the application be and the same is hereby DENIED, for the reasons that no equal protection of laws question is presented by statutory failure to provide for more peremptory challenges in empanelling 14 as distinguished from 12 jurors, * * *."

REASONS FOR GRANTING THE WRIT

The judgment of the Michigan Supreme Court should be reviewed by this Court because:

1. That Court has decided a very substantial and important question arising under the United States Constitution which, our research discloses, has never been passed upon by this Court or any other court in the country.

2. The constitutional question involved in this case is of considerable magnitude because it involves not only the legality of the Michigan 14-man jury law, but also the legality of an identical law in the State of New Jersey. (N.J. Stats. Anno., 2A: 74-2, 78-7.)

Petitioners do not challenge the constitutionality of 14-man jury statutes *per se*. The Michigan statute and similar statutes in effect in other states have uniformly been upheld against attacks that they violate the *due process* clause of the 14th Amendment of the United States Constitution and state constitutional guarantees of trial by jury as it was known at common law. *People v. Van Camp*, 356 Mich. 593, 97 N.W. (2d) 726; *State v. Dolbow*, 117 N.J.L. 560, 189 A. 915, 109 A.L.R. 1488, cert. den. 301 U.S. 669; *People v. Mitchell*, 266 N.Y. 15, 193 N.E. 445, 96 A.L.R. 791. However, the discriminatory effect of the Michigan and New Jersey statutes providing for 14-man juries, which is brought about when peremptory challenges are sought to be invoked, presents an entirely new and different problem which has not heretofore been passed upon by this Court or the court of last resort in New Jersey. The problem involved in the case at bar does not and cannot exist in the many other states having 14-man jury statutes because the legislatures of those states have wisely provided for additional peremptory challenges when augmented juries are employed.[1] Indeed, this Court itself made such pro-

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[1] Ariz.—17 Ariz. Rev. Stats. Anno., Rule 229, Rules of Criminal Procedure.
Cal.—Deering's Calif. Codes (Penal), Sec. 1089.
Ill.—Smith Hurd Ill. Anno. Stats., Ch. 110, Sec. 66, Civil Practice Act.
La.—Sec. 359.1 La. Code of Crim. L. and Proc. (1943 Ed.).
Nev.—2 Nev. Rev. Stats., 175.160.

(Continued on next page)

vision when it adopted Rule 24(c) of the *Federal Rules of Criminal Procedure.*

One point is readily apparent upon a reading of the Michigan 14-man jury statute and that is, that a defendant placed on trial before a 14-man jury has no way of knowing until the trial is concluded which of the 14-member panel will render the verdict in his case. It is to be noted that the statute hereinbefore quoted providing for 5 peremptory challenges makes no distinction between 12-man and 14-man juries. The discriminatory feature above noted is compounded by the fact that a defendant placed on trial before a 14-man jury cannot under any theory exercise his 5 peremptory challenges to the same extent as enjoyed by a defendant on trial before a jury of 12 persons. No argument is necessary to show that spreading 5 peremptory challenges among 14 persons is entirely different from, and obviously less protective than, directing 5 peremptory challenges against the 12 known persons who will ultimately render the verdict.

In adopting the 14-man jury statute, the Michigan legislature has necessarily created two separate and distinct classes—one, consisting of defendants on trial before 14-man juries and the other, consisting of defendants on trial before 12-man juries. However, the 5 peremptory chal-

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(Continued from preceding page)

New Mex.—4 New Mex. Stats. Anno. (1953), Sec. 21-1-1 (47) (b).
N. Y.—66 McKinney's Cons. L. of N.Y. Sec. 358(a).
N. Car.—1B Gen. Stats. of N. Car., Sec. 9-21.
Ohio—23 Page's Ohio Rev. Code Anno., Sec. 2313.37.
Penn.—Purdon's Penna. Stats. Anno., 17§1153.
S. Car.—9 Code of L. of S. Car., 1962, Sec. 38-212.
Utah—9 Utah Code Anno., Sec. 78-46-6.
Wash.—1 Rev. Code of Wash., Sec. 10.49.070.
Wis.—West's Wis. Stats. Anno., Sec. 957.05.
Wyo.—2 Wyo. Stats. (1957), Rule 47(b) Rules Civil Proc.

lenges accorded by the statute hereinbefore set forth is applied equally to both classes, thereby resulting in the discrimination complained of by petitioners. Petitioners readily concede that class legislation is not in and of itself prohibited by the equal protection clause of the United States Constitution, notwithstanding such legislation may necessarily result in some discrimination between the classes. There are, however, limitations on the right of legislative classification. Such classification must be reasonable, and not arbitrary, and must rest upon some difference having a fair and substantial relation to the object of the legislation. *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150; *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183.

It has been held that statutes which give jointly tried defendants only the same number of peremptory challenges, in the aggregate, as is given to a single defendant do not violate the due process clause of the 5th Amendment, *Stilson v. U. S.*, 250 U.S. 583, nor the equal protection clause of the 14th Amendment of the United States Constitution. *State v. Persinger*, (Wash., 1963) — Wash. , 382 P. (2d) 497.

In the *Persinger* case, the Washington court concluded that there was a reasonable justification for the classification and the resulting discrimination in the treatment of the members of the two classes. That court reasoned that, without such limitation on the number of peremptory challenges accorded jointly tried defendants, frequent and undue delays might result and it would not only be inconvenient, but difficult to obtain juries by requiring the presence of an impractical number of jurors. This reasoning by the Washington court is in no way applicable to the case at bar. This is demonstrated by the fact that in the

peremptory challenge statute hereinbefore set forth, the Michigan legislature has seen fit to accord to every defendant 5 peremptory challenges regardless of whether he is tried jointly or alone. In view of the legislative policy thus established in Michigan, it can not reasonably be contended that the allowance of one or two additional challenges would lead to the conditions sought to be avoided by the Washington court. This is further evidenced by the statutes of the many states hereinbefore cited and of Rule 24(c) of the *Federal Rules of Criminal Procedure*, which specifically authorize additional peremptory challenges to defendants who are placed on trial before juries of more than 12 persons.

Petitioners insist that the case of *Hayes v. Missouri*, 120 U.S. 68, relied upon by the state in the court below, is in no way controlling of the case at bar. There, a statute was attacked as denying equal protection because it provided for additional peremptory challenges to the prosecution in capital cases tried in cities having a population in excess of 100,000. This Court justified the reasonableness of the classification on the theory that it might be more difficult to obtain a fair and impartial jury in such cities because of the known tendency of criminals to congregate in large cities and the disposition of business men in such cities to escape jury duty. No such reasonable basis exists for the classification, either deliberately or inadvertently, here attempted by the Michigan legislature.

CONCLUSION

For the reasons hereinbefore set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

PAGE 6 OF CERTIFIED RECORD

(2, 3)

At the opening of the trial, a motion was made by the Prosecuting Attorney to impanel a 14 man jury. Objection was made by counsel for defendants that since the statute authorizing the impaneling of a 14 man jury makes no provision for additional peremptory challenges, the 14 man jury statute in Michigan is unconstitutional because it denies to a defendant equal protection of the law as guaranteed by the United States Constitution. The trial court ruled that the defendants would have the same number of peremptory challenges if a 14 man jury was impaneled as they would have were a 12 man jury impaneled, and accordingly, the objection of the defendants to impaneling a 14 man jury was denied. Defendant Scrap exhausted all five of his peremptory challenges.

FROM PAGE 113 OF CERTIFIED RECORD

(Filed January 15, 1964)

The People of the State of Michigan,
Plaintiff,

v.

Earl Scrap, Ralph Ross and
Barton Frisbee,
Defendants and Appellants.

No. 49892.

In this cause an application is filed by defendant for leave to appeal from the judgment and sentence of Recorder's Court for the City of Detroit, and an answer thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, it is ordered that the application be and the same is hereby Denied, for the reasons that no equal protection of laws question is presented by statutory failure to provide for more peremptory challenges in impaneling 14 as distinguished from 12 jurors, the information properly charges an offense under Michigan law and instructions with respect thereto were not erroneous and other errors complained of did not occur. It is further ordered that bail heretofore allowed herein be and the same is hereby cancelled.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The People of the State of Michigan, by and through their attorneys, Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, and James R. Ramsey, Assistant Attorney General, oppose the issuance of the writ of certiorari to review the judgment of the Supreme Court of Michigan.

OPINION

The opinion of the Court is as set forth in the brief of petitioner.

JURISDICTION

Respondent agrees that the Court has jurisdiction if it chooses to exercise it.

QUESTION PRESENTED

Respondent agrees that the question is as presented by petitioner.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Respondent agrees that the statutes quoted are involved, and also suggests that involved are the provisions of section 768.13, CL 1948 (§28.1036, MSA 1954 Rev), which provides as follows:

> "Any person who is put on trial for an offense punishable by death or imprisonment for life, shall be allowed to challenge peremptorily twenty of the persons drawn to serve as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily fifteen of such persons, and no more. In cases involving two or more defendants, who are being jointly tried for such an offense, each of said defendants shall be allowed to challenge peremptorily twenty persons returned as jurors, and no more; and the prosecuting officers on behalf of the people shall be allowed to challenge peremptorily as many times fifteen of the persons returned as jurors as there may be defendants being so jointly tried."

STATEMENT OF THE CASE

Respondent agrees to the statement of the case.

REASONS FOR NOT GRANTING THE WRIT.

The judgment should not be reviewed because the question raised is not substantial. The precise question involved here has never been passed upon by the Supreme Court of the United States, but other cases have been determined which point the way quite clearly and which indicate the decision that should be rendered in this precise situation.

The only question which can be raised deals with the propriety of the classification. Michigan classifications as they relate to peremptory challenges are based upon the severity of the offense charged. Where the offense charged is not punishable by death or life imprisonment, the defendant is allowed five peremptory challenges and the prosecuting officer five. If there be more than one defendant, each shall have five peremptory challenges and the prosecuting officer shall have an equal number. (CL 1948 §768.12 MSA 1954 Rev §28.1035).

If the offense charged is punishable by death or life imprisonment, the defendant shall have twenty peremptory challenges and the prosecuting officer fifteen. If there be more than one defendant, each shall have twenty peremptory challenges, with the prosecuting officer having fifteen for each defendant. (CL 1948 §768.13 MSA 1954 Rev §28.1036).

Provisions authorizing the calling of a jury consisting of fourteen persons are contained in CL 1948 §768.18 MSA

1954 Rev §28.1041. This section is quoted in the brief of appellant and consequently is not set forth in full here.

It should readily be observed that the Michigan classifications are not based on the number of jurors called. The pattern is set, rather, by the punishment that may be meted out. Thus the peremptory challenge for a jury of twelve may be twenty or five, depending upon the crime charged. Likewise, the number of challenges for a jury of fourteen may be twenty or five, depending upon the crime charged. We find no law which brands this as an improper classification.

Certainly there is no constitutional right to a certain number of peremptory challenges or, for that matter, to any peremptory challenges whatever. The constitutional right is to be tried by an impartial jury. The question of a peremptory challenge never arises until after qualified jurors are sworn. The peremptory challenge has for its object the rejection of a qualified juror and not a disqualified one. This is the rule in Michigan, as well as in other jurisdictions. See *People v. Roxborough*, 307 Mich 575, citing *United States v. Marchant & Colson*, 12 Wheat. 480.

In the case of *Hayes v. Missouri*, 120 US 68, the Court had occasion to pass upon a contention that the statute of Missouri gave more peremptory challenges to the prosecution in capital cases tried in cities of over 100,000 inhabitants than were allowed elsewhere, and held that it did not offend the Fourteenth Amendment. The Court there said:

> "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held. • • •

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U.S. 27, 32."

In *Brown v. New Jersey*, 175 US 172, dealing with the difference in the number of peremptory challenges allowed in the case of a struck jury instead of an ordinary jury, the Court said:

"But that a state may make different arrangements for trials under different circumstances of even the same class of offenses, has been already settled by this court."

The fact that joint defendants had no more peremptory challenges than one defendant would have was considered not a violation of the Sixth Amendment in *Stilson v. United States*, 250 US 583. Also a requirement that joint defendants exercise peremptory challenges jointly was not considered a violation of the Fourteenth Amendment in *State v. Persinger* (Wash), 352 P (2) 497.

It seems to us that the Michigan statute making the classification it does, based upon the nature and degree

of the offense as defined by statute, is not offensive to the Fourteenth Amendment. Neither should it be said that when a trial is prolonged, the drawing of additional jurors without increasing the number of peremptory challenges is offensive. These are, in effect, two different classifications. One is based upon the degree of the offense; the other is based upon the time which will be consumed in trying the issues and reaching a determination. All people falling within the class are treated equally. It would seem that the instant situation is governed by *Brown v. New Jersey, supra.*

CONCLUSION

Respectfully we submit that the present controversy is well within the rules of *Hayes v. Missouri*, and *Brown v. New Jersey*, and in view thereof the petition for certiorari should be denied.

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